

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

ORIGINAL
FILE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Revision of Part 22 of the
Commission's Rules Governing
the Public Mobile Services

CC Docket No. 92-115

To: The Commission

REPLY COMMENTS

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PacTel Paging, Arch Communications Group, AACS Communications, Inc., Answer, Inc., C&W Communications, Cal-Autofone, Communications Enterprises, Desert Mobilfone, Electronic Engineering Company, Flagler Communications, Hello Pager Company, Jackson Mobilphone, Kelley's Telecommunications, LaVergne's Telephone Answering Service, Lowrance Sound & Communications, Midco Communications, Nunn's Communications Services, Inc., Radio Electronic Products Corp., Relay Communications Corporation and Wilcom Corporation (collectively, the "Bryan Cave Commenters") hereby reply to the various comments filed October 5, 1992, with respect to the Notice of Proposed Rulemaking, 7 FCC Rcd. 3658 (1992) (the "Notice"), in which the Commission proposes to revise Part 22 of its rules governing the Public Mobile Services. In reply, the following is respectfully submitted:

I. INTRODUCTION

1. The Commission received comments from thirty-eight parties (referred to collectively herein as "the Commenting Parties") in response to the Notice. The comments range in scope from very extensive, covering all of the major proposed rule changes as well as many minor proposals, to those that discuss only one proposed rule. For the Commission's benefit, Attachment 1 contains a chart which lists all of the commenting parties and indicates the scope of each comment.^{1/}

2. Viewed as a whole, the comments offer overwhelming support for the Commission's overall effort in rewriting Part 22 to simplify, streamline and expedite the licensing mechanisms. On many of the key proposals, a clear industry consensus has emerged in support of the Commission's approach. There are, however, a few important instances in which the industry is virtually united in opposition to certain suggested changes.

3. The degree of concurrence found in the various comments on the key aspects of the Commission's rewrite proposals is truly remarkable. The Commenting Parties encompass the entire broad spectrum of affected entities, including national, regional, and local operators, privately owned and publicly traded companies, one-way and two-way service providers,

^{1/} The comments are listed on the chart in the order of their relative length, starting with the lengthiest comments.

companies affiliated with and non-affiliated with wireline telephone companies, companies that are and are not also providing corollary private radio services, as well as suppliers of services and products to the industry (engineers, manufacturers, law firms, etc.). This is an impressive array of interested parties with unparalleled experience which has a direct bearing on the matters in issue in the Docket. Consequently, the Commission should heed the Comments in areas where there is a clear industry consensus, even where the Commenting Parties oppose proposed rules or approaches.

4. The Bryan Cave Commenters will not repeat here their general agreement with and endorsement of many of the proposals contained in the Notice. A survey of the other Comments reveals general agreement with the Bryan Cave Commenters on these matters, which hopefully means that these aspects of the proposed rewrite will find their way into the final rules. Instead, this Reply focuses on those areas where the Bryan Cave Commenters urged the Commission to abandon or rethink a proposed approach. As it turns out, a significant number of the Commenting Parties express common concerns. This Reply highlights instances where the Commenting Parties generally agree on alternatives to the proposals contained in the Notice.

**II. CERTAIN PROPOSALS IN THE NOTICE MUST BE DELETED
OR SUBSTANTIALLY MODIFIED**

A. First-Come, First-Served Application Processing

5. In their Comments, the Bryan Cave Commenters noted that the Commission's proposal to institute first-come, first-served application processing procedures^{2/} creates serious potential for anticompetitive conduct that may limit flexibility and stifle the ability to expand wide-area paging systems. Comments at 21-22. An overwhelming majority of the other eighteen parties who commented upon this proposal also oppose the change or suggest that the first-come, first-served approach be substantially modified.^{3/}

6. The Bryan Cave Commenters' concerns are echoed by numerous other Commenting Parties, including BellSouth, McCaw, Peters, Radiofone, SBA, Telocator, and U.S. West NewVector. The recurring theme of these comments is that the proposal will seriously interfere with the ability of existing carriers to expand their systems on common frequencies in order to meet ever-increasing demands for wide-area services.^{4/}

^{2/} Proposed §22.509. See Notice at 3659, 3708.

^{3/} See Comments of ALLTEL at 2; BellSouth at 3-4; Joyce & Jacobs at 2-3; McCaw at 26-28; Metrocall at 7-9; Nynex Mobile at 2-3; Peters at 2-4; Radiofone at 2-6; Skytel at 3-4; SBA at 6-12; SMR Systems at 9; Southwestern Bell at 13-14; Telocator at 5-9; U.S. West NewVector at 3-5.

^{4/} Even some commenting parties who offer modest support for the first-come, first-served proposal express some concern over the possible adverse effect it will have on system
(continued...)

7. In the Notice, the Commission requested that commenters undertake a cost-benefit analysis of the likely effect of the proposed rule. Notice at 3659. In response, the Commenting Parties have indicated that a first-come, first-served procedure will substantially increase burdens on both applicants and the Commission because it will inevitably result in an immediate increase in the number of applications filed and processed. See, e.g., Telocator Comments at 7-8. Therefore, most Commenting Parties suggest retaining a window for filing mutually exclusive applications and/or limiting the eligibility criteria for those who may file mutually exclusive applications. For example, Telocator and BellSouth suggest modifying the proposed rule to allow the filing of mutually exclusive applications, within 30 days of Public Notice, by co-channel licensees located within 250 km of the proposed facilities. Telocator Comments at 9; BellSouth Comments at 3. McCaw and Peters make similar proposals, and other Commenting Parties suggest various separation criteria and filing window periods. McCaw Comments at 28; Peters Comments at 3. See also Comments of ALLTEL at 2; Nynex Mobile at 3; SMR Systems at 10; SNET at 11; Southwestern Bell at 13; U.S. West NewVector at 4.

^{4/}(...continued)

expansion. See, e.g., Comments of Page America at 4; SNET at 10-11. Others who support the proposal, such as PageNet, operate principally on 900 MHz frequencies, and thus would be least affected by the change since the Commission and not the carrier makes the ultimate frequency selections in this band.

8. In conversations with the Mobile Services Division staff on this issue, the view has been expressed on occasion by agency personnel that first-come, first-served processing has worked well in the private radio services. There are, however, important differences between private and common carrier regulations that make the licensing experience in the private carrier arena inapplicable here. Many private carrier frequencies are shared. A private carrier operating on a frequency that is subject to sharing does not face the risk of being boxed in by competitors who secure authorizations in adjoining territories. Thus, the competitive concern expressed by the Bryan Cave Commenters does not arise. Also, private carrier channels are generally subject to prior frequency coordination requirements. It is not the practice of frequency coordinators to approve frequency requests that interfere with the expansion of an existing wide-area system. Thus, there is an element of protection in the private context that would not exist in the common carrier context where prior frequency coordination is not part of the licensing process.

9. In view of the general industry opposition to the first-come, first-served proposal, the Commission must reexamine its processing rules to take into account the legitimate concerns of carriers seeking to expand existing systems. By limiting the pool of mutually exclusive applicants, the Commission can achieve its intended goals and also benefit these carriers.

B. Conditional Grants

10. The proposal that applicants self-certify the engineering portion of their applications and that all license grants be conditioned throughout the license term on non-interference^{5/} is opposed by the Bryan Cave Commenters and numerous other Commenting Parties.^{6/} As the Bryan Cave Commenters and others note, the uncertainty engendered by such a rule, including the potential chilling effect on financing and transferability, far outweighs any prospective benefits that may be derived by the Commission or industry members.^{7/} See, e.g., Comments of Bryan Cave at 27; SBA at 18; Telocator at 11.

11. The Commenting Parties suggest several alternatives that more effectively address the Commission's goal of reducing application processing time while maintaining the flexibility to correct problems caused by errors and omissions in self-certified engineering. First, the uncertainty created by imposing a condition for the entire license term must be eliminated by reducing the conditional period. Telocator proposes that the period run one year from the date of

^{5/} Proposed §22.147. See Notice at 3659, 3694.

^{6/} See Comments of BellSouth at 4-5; Joyce & Jacobs at 3-4; Metrocall at 9-11; Radiophone at 6-10; SBA at 16-18; SMR Systems at 5-6; Southwestern Bell at 14-15; Telocator at 9-12; U.S. West NewVector at 5-6.

^{7/} The Bryan Cave Commenters support CTIA's request that the Commission clarify whether the conditional license grant proposal, if adopted, would apply to the cellular service.

commencement of service to the public or from the date of Public Notice of the Form 489 filing, and SNET proposes that the conditional period expire one year after service commences if there has been no formal complaint of interference. SMR Systems, Southwestern Bell, and CTIA also propose shorter conditional periods.^{8/} The Bryan Cave Commenters agree that a shorter period is necessary. If the Commission adopts a rule providing for conditional license grants, it must not allow the period to exist indefinitely.

12. Significantly, BellSouth and U.S. West NewVector properly note that the Commission's existing regulatory authority ensures that the Commission's monitoring and enforcement responsibilities will not be limited to the conditional period. Section 316 of the Communications Act of 1934, as amended (the "Act"), gives the Commission authority to order modification of a license.^{9/} See BellSouth Comments at 5; U.S. West NewVector Comments at 5-6. The Commission has failed to explain why this

^{8/} Comments of Telocator at 11-12; SNET at 11-12; SMR Systems at 6; Southwestern Bell at 15; CTIA at 11.

^{9/} 47 U.S.C. Section 316. Under this section, affected parties are accorded rights to written notice and a hearing. However, in practice no licensee wants to be subjected to the expense of a hearing. As a result, interference problems are routinely resolved by voluntary measures whenever the Commission expresses serious concern. Consequently, the Bryan Cave Commenters disagree with BellSouth and U.S. West NewVector when they suggest that proposed Section 22.147 be modified to deny licensees the opportunity to have their protests aired in the context of a hearing. Section 316 is statutory and clearly contemplates that hearing rights are appropriate in the event license modifications are to be ordered by the Commission.

existing authority is not enough to resolve problems that may arise as a result of self-certification.

13. Moreover, as Radiofone notes, the Commission may not by rule circumvent the protections of Section 312 of the Act, which states that a license may not be revoked without hearing. Radiofone Comments at 7. To the extent that failure to modify facilities pursuant to a conditional grant could lead to revocation proceedings, the proposed rule requires clarification regarding its interpretation.

14. Finally, Radiofone proposes that the Commission make an official database available to all applicants so that applicants may verify the accuracy of their interference analyses prior to certification, and suggests that the Administrative Procedure Act mandates such a database under the circumstances created by the proposed conditional licensing scheme. Radiofone Comments at 9-10. The Bryan Cave Commenters also question whether applicants who must rely on "unofficial" databases^{10/} may in good faith certify their engineering and request the Commission to clarify that certification based in good faith upon "unofficial" databases will not constitute grounds for the imposition of a forfeiture. Bryan Cave Comments at 26.

^{10/} Proposed §22.101 provides that material in individual station files constitutes the official station record and that the Commission's databases will be unofficial records. Notice at 3683.

C. Elimination of the Use of Frequency-Agile Transmitters

15. The proposal to prohibit multi-frequency trasmitters^{11/} finds virtually no support among the Commenting Parties.^{12/} It is clear that the costs imposed on all affected industry members far outweigh the elusive goal of discouraging frequency warehousing.^{13/}

16. The Commenting Parties point out that many alternatives are available to deter warehousing. For example, the imposition of forfeitures or the initiation of revocation procedures for the retention of fallow spectrum, restrictions on refileing for expired authorizations under certain circumstances, limiting certain settlement payments and unreasonable buy-outs, and restricting the instances in which parties may file mutually exclusive applications all will help reduce incentives for warehousing.

17. As Peters states, there are valid engineering reasons for using multi-frequency transmitters. Comments at 16. Moreover, as PageNet notes, "store and forward" technology

^{11/} Proposed §22.507. See Notice at 3670, 3708.

^{12/} See Comments of BellSouth at 21-22; McCaw at 29-32; Metrocall at 24-28; Pac-West Telecomm at 3-4; Page America at 7; PageNet at 21-25; Peters at 16-17; SBA at 19-20; SMR Systems at 7-8; SNET at 2-6; Southwestern Bell at 23-25; Telocator at 34-38.

^{13/} On a related matter, several of the Commenting Parties concur that the proposal to prohibit the shared use of transmitters in the Public Mobile Service and in any other radio service (§22.375) should be deleted. See Comments of Southwestern Bell at 24; Telocator at 36-37.

negates the Commission's concern that when a multi-frequency transmitter is utilizing one frequency another frequency is unavailable. Comments at 22-23. In light of other proposed rule changes, this proposal simply imposes too extreme a penalty on the operations of all carriers and should be modified.

18. Although the Commenting Parties agree that the proposed rule is too drastic, there is little agreement about how the rule should be modified. The Bryan Cave Commenters propose limiting the use of frequency agile transmitters to a finite period of time following commencement of service from the authorized location or to major metropolitan areas where there are frequency shortages. Comments at 31-32. Pac-West Telecomm proposes limiting the prohibition to situations where a channel is assigned to a single licensee or its affiliates. Comments at 3-4. Peters suggests modifying instead the additional channel allocation rules. Comments at 16. SkyTel proposes exempting situations where one frequency is authorized for network paging and another frequency is authorized for non-network use. Comments at 2. SMR Systems suggests a variety of situations that are not conducive to warehousing and where, consequently, multi-frequency transmitter usage should be permitted. Comments at 8. SNET proposes allowing paging operators whose operations cover a majority of a market to use multi-frequency transmitters. Comments at 5. Finally, Southwestern Bell proposes allowing dual-frequency transmitters only. Comments at 24.

19. In view of the diversity of opinion on this issue, the Bryan Cave Commenters must conclude that any rule the Commission adopts which restricts the use of frequency agile transmitters will be a source of constant controversy and potential litigation. On balance, the Commission should simply abandon the propose change and allow the use of such transmitters to be dictated by market forces rather than micro-managed by the Commission.

III. TECHNICAL ISSUES

20. The Bryan Cave Commenters reserved judgment on some of the technical issues raised by in the Notice pending their review of the comments filed by the consulting engineers who deal with these rules on a day-to-day basis. Extensive comments were filed by Comp Comm, Inc. and others^{14/} addressing most if not all of the proposed changes in technical and engineering standards.

21. Generally, the Bryan Cave Commenters defer to the technical expertise of the Commission to assess the various engineering comments and to adjust the proposed rules as necessary to eliminate ambiguities and to avoid unintended consequences of the changes which have been pointed out by some.

^{14/} See, e.g., Comments of Arthur K. Peters, Richard L. Biby, du Treil, Lundin & Rackley and Hatfield and Dawson, all of whom are consulting engineers.

In particular, the Bryan Cave Commenters note that the Comp Comm comments are particularly comprehensive and raise a variety of points worthy of the Commission's serious attention. For example, the concept of developing formulas to calculate service and interference contours for 931 MHz facilities is intriguing.^{15/} See Comp Comm Comments at 15-16.

22. There are, however, a couple of concerns the Bryan Cave Commenters have about certain approaches recommended by Comp Comm. In several instances, Comp Comm is recommending that the number of radials to be studied to make an interference showing must be left to "engineering judgment". Id. at 13, 14. The Bryan Cave Commenters are concerned that this approach is too indefinite and may breed litigation. They urge the Commission to explore the prospect of accommodating the Comp Comm concerns, which are understandable,^{16/} without injecting uncertainty into the calculation process.

23. The Bryan Cave Commenters also disagree with the Comp Comm proposal that fill in transmitters for 931 MHz stations

^{15/} There is, however, a benefit in having the contours of perimeter sites of 931 MHz systems defined in terms of fixed mileage distances so that applicants seeking to engineer systems in adjoining areas need not go through the trouble and expense of securing from the Commission copies of the engineering. Perhaps a reasonable compromise would be to utilize formulas to engineer internal sites but to retain the fixed mileage figures for the perimeter sites.

^{16/} For example, the Bryan Cave Commenters share Comp Comm's concern that interference analyses based solely upon a single inter-station radial analysis may not be sufficient if a sizable null exists in the direction of the station to be protected.

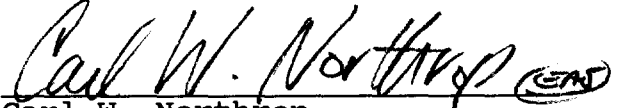
be "located within the composite protected service contour of existing operating 931 MHz stations...". Id. at 9. As indicated in their original comments, the Bryan Cave Commenters recommend that the permissive change rules be relaxed to focus solely upon changes which affect interference contours, not service contours. Comments, para. 73.

IV. CONCLUSION

WHEREFORE, the foregoing premises having been duly considered, the Bryan Cave Commenters respectfully request that the Commission revise and update Part 22 of its rules in a manner consistent herewith.

Respecfully submitted,

PacTel Paging
Arch Communications Group
AACS Communications, Inc.
Answer, Inc.
C&W Communications
Cal-Autofone
Communications Enterprises
Desert Mobilfone
Electronic Engineering Company
Flagler Communications
Hello Pager Company
Jackson Mobilphone
Kelley's Telecommunications
LaVergne's Telephone Answering Service
Lowrance Sound & Communications
Midco Communications
Nunn's Communications Services, Inc.
Radio Electronic Products Corp.
Relay Communications Corporation
Wilcom Corporation

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<u>COMMENTS</u>	<u>PAGES</u>	<u>COUNSEL</u>	<u>SCOPE OF COMMENTS</u>
U.S. West Newvector Group, Inc.	89	Wilkinson, Barker, Knauer & Quinn - Leon Knauer	Major proposals; general application rules; assignments and transfers; operational and technical rules; cellular rules; Forms; related rulemaking proceedings.
Telocator	87	Wiley Rein & Fielding - Michael Senkowski	Major proposals; general application rules; paging and radiotelephone rules; control channel rules; air-to-ground rules; cellular rules; Forms.
BellSouth Corp./ BellSouth Enterprises	85	in-house - William Barfield/David Richards	Major proposals; general application rules; assignments and transfers; cellular rules; Forms; related rulemaking proceedings. Virtually identical to U.S. West NewVector comments.
PacTel Paging, Arch Communications Group, et al.	82	Bryan Cave - Carl Northrop	Major proposals; general application rules; operational and technical rules; air-to-ground rules; Forms.
Paging Network, Inc.	54	Reed Smith Shaw & McClay - Judith St. Ledger-Roty	Most major proposals; general application rules; operational and technical rules.
Comp Comm, Inc.	40	George Schrenk	Major proposals; general application rules; paging and radiotelephone rules; cellular rules; Form 401.

<u>COMMENTER</u>	<u>PAGES</u>	<u>COUNSEL</u>	<u>SCOPE OF COMMENTS</u>
McCaw Cellular Communications, Inc.	40	in-house - Mark Hamilton/ Cathleen Massey	Major proposals; general application rules; operational and technical rules; paging and radiotelephone rules; cellular rules.
Metrocall of Delaware, Inc.	34	in-house - Harry Brock /Christopher Kidd	See Telocator's comments.
GTE Service Corp.	32	in-house - Daniel Bart	Major proposals; general application rules; operational and technical rules; rural radiotelephone rules; air-to-ground service rules; cellular rules.
Arthur K. Peters Consulting Engrs.	31	Self	Most major proposals; some general application rules; some operational and technical rules.
Southwestern Bell Corp.	31	in-house - James Ellis/William Free	Most major proposals; some general application rules; some cellular rules.
Radiofone, Inc.	27	Blooston, Mordkofsky, Jackson & Dickens - Harold Mordkofsky	Most major proposals; some general application rules; some operational and technical rules.

<u>COMMENTS</u>	<u>PAGES</u>	<u>COUNSEL</u>	<u>SCOPE OF COMMENTS</u>
Bell Atlantic Companies	25	Crowell & Moring - John Scott	General application rules; some operational and technical rules; cellular rules; Forms; proposes new cross-reference table. Discussion of major proposals is brief.
New Par	22	Skadden, Arps - Thomas Casey	Some major proposals; some general application rules; some operational and technical rules; cellular rules.
U.S. Small Business Administration	22	Barry Pineles	Several major proposals. Focus is on small paging operators.
International Mobile Machines Corp.	21	in-house - Jack Taylor	BETRS rules.
Applicants Against Lottery Abuses	16	Fisher Wayland Cooper & Leader - Eliot Greenwald	Limitation on settlement payments (\$22.129); two concerns with Form 401.
SMR Systems, Inc.	16	Pepper & Corazzini - William Franklin	Major proposals; some general application rules; some technical rules.
Nynex Mobile Communications Co.	14	in-house - Ed Wholl/Stephen Wiznitzer	Some major proposals.
SNET Paging, Inc.	14	Ginsburg, Feldman & Bress - Rodney Joyce	Several major proposals.
Claircom Communications Group	10	Akin, Gump, Hauer & Feld - Tom Davidson	Air-to-Ground service rules; some general rules.

<u>COMMENTS</u>	<u>PAGES</u>	<u>COUNSEL</u>	<u>SCOPE OF COMMENTS</u>
Joyce & Jacobs	10	Frederick Joyce	Some major proposals.
CTIA	9	in-house - Michael Altschul	General application rules; some cellular rules. Very little discussion of major proposals.
Pacific Bell/Nevada Bell	9	in-house - James Tuthill/Lucinda Mates	Most major proposals; some general application rules.
Page America Group, Inc.	9	Latham & Watkins - James Rogers/Roy Growchowski	Some major proposals; some general application rules.
United States Telephone Association	9	in-house - Martin McCue/Linda Kent	Some general application rules; some operational and technical rules; Form 401.
Centel Cellular Company	8	in-house - Kevin Gallagher	General application rules; related rulemaking proceedings.
Petroleum Communications, Inc.	7	Blooston, Mordkofsky, Jackson & Dickens - Arthur Blooston	§22.913(b) only.
PacTel Cellular	6	in-house - Michael Mowery	Some general application rules; some cellular rules; Forms; related rulemaking proceedings.
Pac-West Telecomm, Inc./PagePrompt U.S.A.	6	Pepper & Corazzini - William Franklin	§22.507(a) only.
ALLTEL Mobile Communications, Inc.	4	in-house - Carolyn Hill	Briefly treats some major proposals. Worked with CTIA on their Comments.

<u>COMMENTS</u>	<u>PAGES</u>	<u>COUNSEL</u>	<u>SCOPE OF COMMENTS</u>
Hatfield & Dawson Consulting Engineers, Inc.	4	in-house	§22.371, §22.157 and §22.159.
SkyTel Corp.	4	Lukas, McGowan, Nace & Gutierrez - Thomas Gutierrez	§22.507; deletion of current §22.31(b). Generally supports Telocator.
Vanguard Cellular Systems, Inc.	4	in-house - Richard Rowlenon	Some general application rules; cellular rules.
The Antenna Specialists Company	3	in-house - C. Watkins/J. Knauss	§22.507(a) only.
Richard L. Biby Communications Engineering Services, P.C.	2	Self	§22.371 only.
du Treil, Lundin & Rackley, Inc.	2	L. du Treil	§22.371 only.
RVC Services, Inc.	2	Hogan & Hartson - Richard Rodin	§22.913(b) only.

CERTIFICATE OF SERVICE

I, Sharon Powell Jefferson, a secretary in the law firm of Bryan Cave, do hereby certify that on this 5th day of November, 1992, I sent copies of the foregoing **REPLY COMMENTS OF PACTEL PAGING, ARCH COMMUNICATIONS GROUP, ET AL.**, via first class mail, postage prepaid, to the following:

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